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No. 10-941

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DERRICK O'NEAL MASON,

Petitioner,

—v.—

KIM T. THOMAS, Interim Commissioner,
Alabama Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THIS COURT SHOULD REVIEW THE ELEVENTH CIRCUIT'S HARMLESS ERROR ANALYSIS OF MR. MASON'S CONFRONTATION CLAUSE VIOLATION

A. The Confrontation Clause Claim Was Fairly Raised in the State Courts

The Eleventh Circuit flatly rejected the State's argument that Mr. Mason's Confrontation Clause claim was procedurally defaulted. The State's attempt to revive its meritless argument before this Court is indicative of the overall weakness of its position with respect to this claim. The Eleventh Circuit held that Mr. Mason's Confrontation Clause claim was fairly raised not only because he stated the basis for his claim in his brief to the Alabama Court of Criminal Appeals, identifying the out-of-court statements that Mr. Mason was "out of control and out to make a name for himself," but also because Mr. Mason specifically cited the Sixth Amendment as the grounds for his Constitutional challenge. R.E. 1086 – 1118.

The Eleventh Circuit further cited controlling precedent, which only requires a petitioner to "make the state court aware that the claims asserted present federal constitutional issues," in order to satisfy the exhaustion requirement. *Snowden v. Singletary*, 135 F.3d 732, 735-36 (11th Cir. 1998). Without a doubt, Mr. Mason satisfied that standard. The State, however, seeks to deflect this Court's attention from the real issue of whether the violation of Mr. Mason's Confrontation Clause claim is harmless by, again, raising procedural default.

B. The Circuit Court Split on the Harmless Error Analysis Merits This Court's Review

A principal basis on which this Court grants a petition for certiorari is to resolve conflicts among Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991); Sup. Ct. R. 10. The State should not suggest that the Court shirk that responsibility on the basis that the Fifth and Second Circuit cases cited by Mr. Mason contain different facts, when the Fifth and Second Circuits have applied a different standard in analyzing harmless error.

The State incorrectly asserts that the only differences between the decision below and the Fifth Circuit's opinion in *Fratta v. Quatterman*, 536 F.3d 485 (5th Cir. 2008), are factual. In *Fratta*, there was significant evidence against the defendant other than the hearsay statements, admitted in violation of the defendant's Confrontation Clause rights, including testimony from several witnesses that the defendant made statements about killing or having someone kill his wife. The Fifth Circuit cautioned that in making a harmless error determination, "the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Fratta*, 536 F.3d at 508 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The Eleventh Circuit here, however, did just what the Fifth Circuit cautioned against when it looked solely to the "overall strength of the prosecution's case and the presence of cor-

roborating evidence" to make its determination. App.16a. The Eleventh Circuit, in Mr. Mason's case, articulated a standard of review more deferential to the prosecution and the state court's determination of a petitioner's constitutional rights than the standard articulated by the Fifth Circuit. This represents a fundamental difference in the substantive rights of criminal defendants and merits this Court's review.

Mr. Mason's case exemplifies the impact of this lower standard. Had the Eleventh Circuit not ended its analysis at the strength of the prosecution's case and looked to the substantial influence of the hearsay statements, its result would have been different. The informant's out-of-court statements admitted in Mr. Mason's trial were damning and indisputably had a substantial influence on the jury. Based on the *Fratta* court's analysis, the Eleventh Circuit's rationale that Mr. Mason *could* have been convicted and sentenced to death anyway, based on the other evidence, is insufficient. Under the *Fratta* decision, the Eleventh Circuit would be required to analyze whether the statements that violated Mr. Mason's Constitutional rights had a substantial impact. And, like the *Fratta* case, the statements here "cannot be described as anything less than substantial." *Fratta*, 536 F.3d at 510.

Furthermore, the facts of the *Fratta* case could not be more similar, because not only were the improper statements admitted at trial, but the State magnified the effect of those statements by highlighting and repeating them during closing argument. In addition, the *Fratta* court noted that the effect of the custodial statements was

undoubtedly enhanced by the fact they were related through the testimony of a police officer "who could command the jury's respect," *id.* at 511, which is exactly the situation in Mr. Mason's case.

The Second Circuit case, *United States v. Gomez*, 617 F.3d 88 (2d Cir. 2010), contains similar facts, because there too the court held that testimony by a detective that a co-conspirator's identification of the defendant as his supplier was inadmissible hearsay. The *Gomez* court further held that even a limiting instruction by the judge did not correct the harm caused by the admission of such hearsay. The *Gomez* court clarified that improperly admitted evidence has substantial weight if it goes to the core of the government's case; again, identifying a higher standard than that articulated by the Eleventh Circuit. *Id.* at 97.

It cannot be disputed that the informant's statements went to the core of the prosecution's case against Mr. Mason. Detective Renfroe, one of the key witnesses against Mr. Mason, testified regarding the entirety of his interactions with the informant, who was never identified, much less subjected to cross-examination. Further, the arrest and location of the murder weapon were the direct result of the informant's conversations with the police. The prosecutor repeated the informant's out-of-court statements throughout the guilt and sentencing phases, reminding the jury of the prosecution's key "evidence." Had the Eleventh Circuit considered the substantial impact of the informant's statements instead of simply considering the strength of other evidence, the panel would have come to the conclusion that

the Constitutional violation was not harmless. As discussed below, Mr. Mason's alleged use of any of the informant's statements does not cure the defect.

Finally, the State's claim that Mr. Mason did not raise the circuit split in his brief to the Eleventh Circuit is illogical and meritless. Resolving splits among the circuits is the principal responsibility of *this* Court; failing to identify a circuit split in briefing before a Court of Appeals does not preclude such review.

C. Mr. Mason's Claim That the State's Sixth Amendment Violation Was Not Harmless Has Merit

The State incorrectly addresses only a portion of the hearsay statements and utterly fails to consider the resulting prejudice of the remainder of the hearsay statements that Mr. Mason was "out to make a name for himself." Here, the prosecution improperly relied on the entirety of the hearsay, amplifying the error by arguing at sentencing that Mr. Mason "wants to write a book" and that he intended to profit from the crime. These arguments, which were unsupported by the record, served no purpose other than to inflame the jury and increase the likelihood of a sentence of death. Where, as here, the jury recommended death by the bare minimum vote of 10-2, the error in admitting the hearsay statements had a substantial and injurious influence on the jury's verdict and Mr. Mason's resulting death sentence. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Finally, there is simply no basis for the State's assertion that a Constitutional violation can in

any way be cured by Mr. Mason's assertions during the sentencing that, as a mitigating factor, he could not control his conduct. The hearsay statements that Mr. Mason was "out of control and out to make a name for himself," taken together with the prosecution's argument that Mr. Mason intended to write a book and profit from the crime, clearly showed an intent by the prosecution to paint Mr. Mason as a remorseless, publicity-seeking killer deserving of the death penalty. The judge's finding that Ms. Cagle was killed in an "execution-style" killing—despite no evidence to support this finding—show that the Constitutional violation had the very effect that the prosecution intended: to inflame the judge and jury to support a death sentence. That Mr. Mason had an impaired capacity to appreciate the criminality of his conduct or that he could not control his behavior due to his intoxication, is irrelevant to the analysis of whether the hearsay statements had a substantial and injurious influence on the judge and jury's assessment of aggravators and mitigators leading to Mr. Mason's death sentence.

II. THE ELEVENTH CIRCUIT'S DECISION DECLINING TO REVIEW MR. MASON'S *MIRANDA* CLAIM ON ITS MERITS WARRANTS THIS COURT'S REVIEW

The State argues that Mr. Mason's claim under *Miranda v. Arizona*, 384 U.S. 436 (1966), is procedurally defaulted because Alabama's "plain error" rule does not remove the bar to federal court review of procedurally defaulted claims. The State, however, misconstrues Mr. Mason's argument, which does not rely on the plain error rule

for the federal courts to reach the merits of his *Miranda* claim.

To properly preserve a claim for federal habeas review, this Court requires that a petitioner fairly present his claim to one full round of the state's established appellate review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Claims raised on federal habeas review, however, need not be identical to their counterparts raised in the state courts. *See, e.g., Green v. Nelson*, 595 F.3d 1245, 1254 (11th Cir. 2010) (language of federal and state habeas petitions need not be identical for fair presentment of claim); *Bright v. Williams*, 817 F.2d 1562, 1565 (11th Cir. 1987) ("Once the petitioner places the legal theory and supporting facts before the state court . . . he is not precluded from raising additional facts in support of his claim in a federal habeas petition."). Moreover, state court findings can indicate the fair presentment of a claim. *See Green*, 595 F.3d at 1254.

Mr. Mason fairly presented his *Miranda* claim to the Alabama state courts on direct appeal. Mr. Mason made a pre-trial suppression motion arguing "[t]he totality of the circumstances shows that the [alleged custodial] statement was involuntary and taken in violation of federal and state constitutional guarantees." R. 214. Extensive testimony was elicited at the hearing concerning the coercive and involuntary nature of Mr. Mason's alleged custodial statements. R. 597-756. Although the trial court denied Mr. Mason's motion without analysis (R. 755-56), the Court of Criminal Appeals made specific findings regarding Mr. Mason's *Miranda* claim: "The evidence established that the appellant was advised of his rights

three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was *no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducements or threats.*" App.81a (emphasis added). The Court of Criminal Appeals on a rehearing application and the Alabama Supreme Court reviewed and affirmed the Court of Criminal Appeals' decision. App.102a. The specificity of the Court of Criminal Appeals' erroneous finding that Mr. Mason was not under the influence of drugs and that Mr. Mason was not coerced by inducements or threats, shows that Mr. Mason indeed presented both the legal theory and supporting facts to the state courts.

The State's reliance on *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), is misplaced. *Julius* held that the mere existence of a plain error rule does not preclude a finding of procedural default, and the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. *Id.* at 1546. However, the petitioner in *Julius* conceded that he did not raise his claims at the appropriate time, and solely relied on the plain error rule to preserve his claims for federal habeas review. *Id.* at 1547. Here, at the very least, due to the specific nature of the Court of Criminal Appeals' finding, "there is some indication that the state court was aware of [the] issue," and thus Mr. Mason's *Miranda* claim falls outside of *Julius*' holding. *See id.* at 1546.

Accordingly, because Mr. Mason fairly presented his *Miranda* claim to the Alabama state courts on direct appeal, the federal courts should have considered this claim on its merits.

III. THE ELEVENTH CIRCUIT'S DECISION DENYING MR. MASON A CERTIFICATE OF APPEALABILITY ON SEVERAL OF HIS CONSTITUTIONAL CLAIMS MERITS THIS COURT'S REVIEW

A. The State Applies the Incorrect Standard of Review

The District Court, after denying Mr. Mason's habeas petition, denied Mr. Mason's application for a certificate of appealability ("COA") in its totality. Mr. Mason then applied to the Eleventh Circuit for a COA, which granted the application on several claims but denied the application with respect to several potentially meritorious claims, which required no additional factual development and were well-suited to federal appellate review. The State's opposition addressed each of the five claims Mr. Mason identified in his Petition for Certiorari separately; however, it applied the incorrect standard of review throughout.

A habeas petitioner seeking a COA is only required to demonstrate a substantial showing of the denial of a constitutional right. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This Court has held that the standard is satisfied if reasonable jurists could find the district court's assessment of the claims to be debatable or wrong. *Id.* at 327, 338. The same standard applies to substantive claims and the district court's determination that

a claim has been procedurally defaulted. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The State, however, consistently refers this Court to the standard for granting a habeas petition, not the standard for granting a COA. The State argues that Mr. Mason did not demonstrate that "the State court's determination of this issue 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Opp. at 23, citing 28 U.S.C. § 2254(d)(1)-(2).

The State has effectively put the cart before the horse. Mr. Mason does not argue in his Petition that habeas relief should be granted on his claims that the State exercised its peremptory challenges to exclude potential jurors on the basis of their race or gender, of prosecutorial misconduct, that the trial court's findings and jury instructions concerning aggravators and mitigators were erroneous, for ineffective assistance of counsel, and for an evidentiary hearing. Instead, Mr. Mason asks this Court to review whether the Eleventh Circuit properly denied a COA on those claims to allow Mr. Mason to argue them on appeal. When analyzed using the proper standard of review, it is clear that reasonable jurists could have debated the merits of these claims and whether they were preserved for federal habeas review.

B. The State Misrepresents the Record With Respect to Mr. Mason's Claims Regarding Jury Instructions on Aggravators and Mitigators

The State argues that Mr. Mason's claim that the trial court's jury instruction was improper because it did not instruct the jury that it had to find aggravators beyond a reasonable doubt was "raised for the first time in Mr. Mason's certiorari petition," Opp. at 26, and for that reason alone this Court should not review the claim. However, an accurate reading of the record reveals that Mr. Mason presented this issue on direct appeal to the Alabama state courts in the context of his ineffective assistance of trial counsel claim. R.E. 973, 1111, 1164. Mr. Mason also presented this claim to the District Court which determined this claim to have been defaulted, despite it having been presented on direct appeal. The State's suggestion that Mr. Mason had not previously presented this argument is simply not borne out by the record.

Based on the record as it stands, reasonable jurists could debate whether the claim was preserved for habeas review and whether the trial court's jury instructions improperly instructed the jury on the determination of aggravators and mitigators. Therefore, a COA was warranted on this claim.

IV. THE DETERMINATION THAT SEVERAL OF MR. MASON'S CLAIMS ARE PROCEDURALLY BARRED MERITS THIS COURT'S REVIEW

The District Court determined that several of Mr. Mason's meritorious claims were procedurally barred because his appeal of his Rule 32 petition was not timely; however, there is no adequate basis for barring federal habeas review of these claims because the procedural rules invoked were arbitrary, inconsistent or unpredictable. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). While the State relies heavily on the fact that several Alabama state court cases have held that the procedural rules at issue were consistently and predictably applied, this Court has reached a different conclusion. This Court has determined it necessary to review these very rules when it recently granted the petition for certiorari in *Maples v. Allen*, No. 10-63, invoking similar principles and calling into question whether Mr. Maples should suffer the very prejudice Mr. Mason stands to suffer because of the arbitrary application of Alabama Rule of Criminal Procedure 32.1(f), which bars out-of-time appeals under circumstances such as Mr. Mason's, who was blameless for the missed deadline. If this Court does not grant Mr. Mason certiorari on this issue, at a minimum, this Court should stay this Petition pending the resolution of Mr. Maples' case.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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